

Client Alert

Employment Law Update



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Massachusetts Passes Pay Equity Act¹

On August 1, 2016, Massachusetts Governor Charlie Baker made news across the Commonwealth and around the country when he signed into law An Act to Establish Pay Equity (the "Pay Equity Act"), which strengthens the state's existing equal pay law and imposes certain new obligations and limitations on employers. This Client Alert provides an overview of the key provisions of the new law. Employers should take advantage of the time before the Pay Equity Act goes into effect on July 1, 2018 to understand the requirements of the law and consider compliance strategies.

Requiring Equal Pay for Comparable Work

The Pay Equity Act, like the current Massachusetts equal pay law, requires that employers pay men and women the same wage if they do comparable work. The new law goes on to define "comparable work" as any work that requires "substantially similar skill, effort and responsibility, and is performed under similar working conditions." A job title or job description standing alone does not determine what work is comparable. Thus, even if a male employee and a female employee have different job titles, if those jobs are "comparable" as that term is defined in the law, one may not receive lesser wages than the other. The term "wages" is defined broadly in the law to include all forms of remuneration for employment. Under the existing version of the law, variations in rates of pay for comparable jobs are not prohibited if based upon a difference in seniority. The Pay Equity Act provides additional flexibility to employers, permitting variations in wages if based upon:

- seniority systems, provided that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave shall not reduce seniority;
- merit systems;
- a system that measures earnings by "quantity or quality of production, sales, or revenue";
- the geographic location of a job;
- education, training, and experience that is "reasonably related" to the job performed; and
- travel that is "a regular and necessary condition" of the job.

It is important to note that employers may not reduce the wages of any employee solely in order to comply with the law. Thus, if an employer discovers that a female employee is being paid less than a male employee who is doing

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comparable work, the employer may not reduce the male employee's wages solely to comply with the law.

Affirmative Defense for Internal Review of Pay Practices

In order to avoid or mitigate potential liability under the equal pay requirements of the Pay Equity Act, employers may choose to take advantage of the law's affirmative defense provisions. If an employee brings an action for violation of either the Pay Equity Act or the pay discrimination provisions of the Massachusetts Fair Employment Practices Act (MFEPA), the employer has an affirmative defense to liability if, within the previous three years and prior to the commencement of the action, the employer has both **(1)** completed a good-faith self-evaluation of its pay practices and **(2)** can demonstrate "reasonable progress" has been made towards eliminating wage differentials based on gender for comparable work. The self-evaluation can be of the employer's own design, so long as it is reasonable in detail and scope in light of the size of the employer. If an employer goes through this process, but their evaluation is not deemed reasonable in detail and scope, the employer does not get the affirmative defense, but would no longer be liable for liquidated damages. Put simply, the law provides major incentives for employers to embark on the self-evaluation process. If an employer does so, the law imposes certain limits on the extent to which either the evaluation or the remedial steps can be used as evidence against the employer in cases brought under the Pay Equity Act or MFEPA. It is important to note, however, that nothing in the Pay Equity Act would prevent the admission of such evidence in connection with claims under federal law or the laws of other states.

Pay Transparency and Pay History

The Pay Equity Act includes several provisions intended to make it easier for employees to talk with each other about wages. In particular, it prohibits employers from requiring, as a condition of employment, that an employee refrain from inquiring about, discussing or disclosing information about either their own wages or the wages of any other employee. So, for example, an employer could not require employees to sign a confidentiality agreement that prohibits the employee from disclosing compensation information. Similarly, employers may not discharge or otherwise retaliate against employees who disclose their own wages, or inquire about or discuss the wages of other employees.

There is one exception to this rule – employers may prohibit human resources employees, supervisors or other employees whose job responsibilities require or allow access to other employees' compensation information from disclosing such information without the prior written consent of the employee, unless the information is a public record under state law. While employees are given broad leeway to discuss information about their compensation, the law does not specifically obligate employers to share such information with another employee or a third party (though employees may otherwise be obligated to do so, for example, such disclosures may still be required in connection with a government investigation or litigation).

The Pay Equity Act also prohibits employers from asking job applicants about salary history or seeking such information from an applicant's current or former employer. Thus, for example, it would be unlawful to require an employee to list his or her prior compensation on an application form. Employers are further barred from requiring that a prospective employee's prior wage or salary history meet certain criteria. If, however, a prospective employee voluntarily discloses their prior wage or salary information, a prospective employer may confirm it. A prospective employer may also seek or confirm a prospective employee's wage or salary after an offer of employment with compensation has been "negotiated and made" to the prospective employee. The statute, by its terms, does not prevent an employer from asking an applicant to state their desired salary. Employers should be careful, however,

that two employees in comparable jobs do not end up with different levels of compensation simply because one of them demanded higher wages as part of the application process.

Consequences of Non-Compliance

The Pay Equity Act provides serious consequences for the failure to comply with its requirements. The new law allows aggrieved employees and applicants to bring suit on their own behalf and on behalf of similarly situated individuals. There is no requirement that employees or applicants first file a complaint with the Massachusetts Commission Against Discrimination, as is the case with the MFEPA. Employees and applicants have three years from the date of the alleged violation to bring such claims. Employers that violate the equal pay requirements Pay Equity Act may be liable for unpaid wages, an additional equal amount in liquidated damages, attorneys' fees, and costs. Employers that violate the pay transparency and pay history provisions of the Pay Equity Act may also be liable for additional damages suffered by an employee or applicant as a result of the employers' violation of the Act. The Attorney General may also bring actions on behalf of one or more employees or applicants, with no filing fee or costs, and can be awarded attorneys' fees. If an employee sues and wins under the comparable pay provisions of both state and federal law for the same violation, the employee must return to the employer the lesser of the two awards.

Next Steps

The Pay Equity Act empowers the Attorney General to issue regulations interpreting and applying the provisions of the law and to issue forms and templates related to employer self-assessments. It is anticipated that the Attorney General will do so well in advance of the date the new law goes into effect, and will invite employers to offer input and commentary, as was the case with the sick leave law.

The Pay Equity Act establishes a "special commission" to investigate, analyze and study the factors, causes and impact of disparity based not only on gender, but also race, religion, sexual orientation, gender identity and other protected classes under Massachusetts law, and to submit its findings no later than January 1, 2019. These findings may provide the impetus for further legislative or regulatory action on the issue of equal pay.

The Pay Equity Act does not go into effect until July 1, 2018; however, equal pay for comparable work is already the law in Massachusetts, and the federal Equal Pay Act has been in place since 1963. The new law should serve as a wake-up call to employers to assess their pay practices, and take steps to address any potential gender-based pay disparities among employees performing comparable work.

Employers with questions or concerns regarding the Pay Equity Act can contact Ari Kristan or any other Hirsch Roberts Weinstein LLP attorney.